

**NATIONAL INTERIOR CONTRACTORS,
INC.****VABCA-3994 & 4561****CONTRACT NO. V635C-577****VA MEDICAL CENTER
OKLAHOMA CITY, OKLAHOMA**

Peter M. Daigle, President, National Interior Contractors, Inc., Centerville, Massachusetts, for the Appellant.

James Petersen, Esq., Trial Attorney; *Charlma Jones, Esq.*, Deputy Assistant General Counsel; and *Phillipa L. Anderson, Esq.*, Assistant General Counsel, Washington, D.C., for the Department of Veterans Affairs.

**OPINION BY ADMINISTRATIVE JUDGE KREMPASKY
BACKGROUND**

These appeals arise out of Contract No. V635C-577 ("Contract") for renovation of a building at the Department of Veterans Affairs Medical Center in Oklahoma City, Oklahoma ("VAMC Oklahoma City"). The Contract was awarded on September 25, 1992 in the amount of \$196,325. After National Interior Contractors, Inc. ("NIC" or Appellant) had left the job sometime in August or September 1993, Respondent, Department of Veterans Affairs ("VA" or "Government") directed NIC to complete the "punchlist" and other work remaining. In the face of NIC's failure to return to the site and asserting its rights under the Contract inspection and acceptance provisions, the VA ended Appellant's rights to complete "punchlist" and other non-conforming work by final decision on November 1, 1993 and undertook the work itself. The final decision asserted a Government claim of \$19,256 for the completion work and \$21,373 for two erroneous duplicate payments made to NIC.

NIC directed its initial NOTICE OF APPEAL in what is now the appeal in VABCA No. 3994 to the Armed Services Board of Contract Appeals ("ASBCA"). The NOTICE OF APPEAL reached the ASBCA on February 22, 1994; we received it on April 7, 1994. However, the NOTICE OF APPEAL, dated January 31, 1993, was mailed in an envelope bearing a postal machine postmark date of January 30, 1993, and a post office postmark of February 16, 1994. Because it had determined that the appeal was apparently taken from a contracting officer's final decision of July 12, 1993, the Board, upon docketing the appeal, also ordered NIC to show cause why the appeal should not be dismissed since it appeared that more than 90 days had elapsed from NIC's receipt of the final decision.

In response to the April 1994 ORDER TO SHOW CAUSE, Appellant orally notified the Board that it was appealing a final decision dated November 1, 1993, not the final decision of July 12, 1993. Based on this representation, the Board determined the appeal to be timely and set a schedule for further proceedings in the appeal.

The November 1, 1993 final decision encompassed Government claims for completion

of non-conforming and punch list work and recoupment of two erroneous payments. In several prehearing ORDERS, the Board clearly defined the scope of the appeal in VABCA No. 3994 and expressly informed the parties that only matters relevant to the Government's claim would be proper subjects of discovery. Notwithstanding this fact, NIC persisted in its efforts, despite the admonitions and direct orders of the Board, by assertions in its Complaint and its discovery requests, to extend the scope of the VABCA No. 3994 to include claims by NIC.

In the course of dealing with Appellant's efforts to extend the scope of the Appeal in VABCA No. 3994, involving dismissal and denial of several motions by NIC to compel extensive discovery unrelated to the VA's claims, the Board determined that NIC on August 25, 1993 had demanded a final decision on its equitable adjustment claims totaling approximately \$39,000 for various change and delay claims. NIC asserted that the VA had never responded to the August 25, 1993 claim. Consequently, on March 15, 1995 the Board docketed the appeal in VABCA No. 4561 as an appeal from the VA's deemed denial of NIC's equitable adjustment claim.

On March 24, 1995, the VA moved to dismiss VABCA No. 4561 as untimely citing a November 5, 1993 final decision responding to NIC's August 25, 1993 claim. In the response to the MOTION, Mr. James Lawson on behalf of NIC maintained that NIC had never received any response to its August 25, 1993 claim and maintained that the Board had erroneously eliminated its claims from the scope of the appeal in VABCA No. 3994. Since the VA failed to affirmatively prove NIC's receipt of the final decision, the Board, on May 16, 1995, denied the VA's MOTION TO DISMISS. ***National Interior Contractors, Inc.***, VABCA NO. 4561, 95-2 BCA ¶ 27,757. On June 2, 1995, the VA renewed its MOTION TO DISMISS, this time presenting probative evidence that Mr. James Lawson had signed for NIC's receipt of the November 5, 1993 final decision. Although the Board denied the MOTION for other reasons, the Board expressly found that NIC received the final decision on November 9, 1993. ***National Interior Contractors, Inc.***, VABCA NO 4561, 95-2 BCA ¶ 27,876.

The appeals in VABCA Nos. 3994 and 4561 were consolidated for hearing in April 1995. After the Board's denial of the second MOTION TO DISMISS on August 14, 1995, the Board, through various ORDERS, set forth the schedule for the parties' completion of necessary prehearing activities. NIC consistently ignored the Board's ORDERS by either failing to file required submissions or filing such submissions late. NIC's, and Mr. Lawson's actions in this period included attempts to expand the scope of the appeals contrary to the Board's directions, and total failure to cooperate with the VA in necessary prehearing activities. In the face of these actions the Board was required, on several occasions, to issue formal directions and multiple ORDERS to NIC to move proceedings in the appeal forward.

Mr. Peter Daigle is the President of NIC and Mr. James Lawson is the Vice-President. The initial Notice of Appeal in VABCA No. 3994 was executed by Mr. Daigle on behalf of NIC. Six months after being directed to do so, Mr. Lawson filed a written NOTICE OF APPEARANCE for NIC. Several times during the period April 1994 to July 1996, Mr. Lawson: 1) failed to make himself available for prehearing conferences, 2) changed his address; and, 3) changed his voice or fax phone number, all without prior notice to the Board.

In July 1996, after several unsuccessful attempts to mail the Board's final PREHEARING ORDER, dated June 21, 1996, the Board was finally able to contact Mr. Daigle. Mr. Daigle informed the Board that Mr. Lawson was no longer associated with NIC. The Board had received no notice of this fact. After being formally directed to do so by the Board, Mr. Daigle filed a NOTICE OF APPEARANCE on behalf of National Interior Contractors, a week after the due date established by the Board.

The Board's June 1996 PREHEARING ORDER set the hearing in these appeals to begin on October 8, 1996 in Oklahoma City and established deadlines for the parties' filing of their witness lists, hearing exhibits, schedule of costs, and a Joint Comprehensive Statement of Facts; the ORDER also established a final telephonic prehearing conference to be held on October 1, 1996. NIC failed to submit its witness list, its hearing exhibits, its schedule of costs or reply to the Government's schedule of costs. In addition, NIC failed to confer with the VA for the purposes of preparing the Joint Comprehensive Prehearing Statement of Facts.

At the October 1, 1996 telephonic Prehearing Conference, scheduled in the PREHEARING ORDER, Mr. Daigle informed the Board that Mr. Lawson had filed for voluntary bankruptcy under the name "James Lawson d/b/a National Interiors *et. al.*" Based on this, Mr. Daigle sought a stay to the proceedings citing the Federal bankruptcy provisions. Mr. Daigle confirmed that NIC was a Massachusetts corporation; that Mr. Daigle was its president; and, that NIC had not filed for bankruptcy. The Board refused to grant a "stay," pointing out that Mr. Lawson's individual bankruptcy petition had no effect on the Board's ability to conduct a hearing and render a decision on NIC's appeals. The Board directed Mr. Daigle to file the exhibits and witness list required by the PREHEARING ORDER by close of business October 1 or NIC, as was provided for in the ORDER, would not be permitted to call any witnesses or introduce any evidence at the hearing. In addition, Mr. Daigle was ordered to be prepared to discuss the COMPREHENSIVE PREHEARING STATEMENT OF FACTS at the start of the hearing in Oklahoma City. He was further advised that the Board was considering admitting the STATEMENT OF FACTS, as submitted by the VA, as stipulated facts. Mr. Daigle indicated that since Mr. Lawson was his sole witness and that, since he felt constrained by Mr. Lawson's bankruptcy petition, he did not believe he would appear at the hearing and that he may withdraw the appeals. The Board directed the withdrawal to be filed by noon on October 3, 1996.

On October 2, 1996, by, facsimile transmission, the Board received a NOTICE OF VOLUNTARY DISMISSAL from Mr. James Lawson. In this NOTICE, Mr. Lawson asserts that he is the "alter ego" of NIC, citing a National Labor Relations Board case as authority for that statement. He "gives notice of a Voluntary Dismissal without prejudice pursuant [to] Rule 41(a)(1) of the Federal Rules of Civil Procedure" of VABCA Nos. 3994 and 4561. Mr. Lawson also asserts that the Board may take action only by leave of Bankruptcy Court under "Rule 28 U.S.C.A. 1334."

At the Board's request, the VA furnished a copy of Mr. Lawson's Bankruptcy Petition. Mr. Lawson filed his petition for individual, voluntary bankruptcy under Chapter 11 of title 11 of the *United States Code* in the United States Bankruptcy Court for the District of Rhode Island on July 24, 1996. On the Petition Form block requiring a listing of all other names (including trade names) used by the debtor, Mr. Lawson stated: "D/B/A/

American Builders,/Total Property Service/J&K Interiors Contractors/National Interior." Mr. Lawson does not list the Department of Veterans Affairs as either a creditor or debtor in his petition.

At the request of the VA, the Board convened another telephonic Prehearing Conference on October 4, 1996 to discuss Mr. Lawson's NOTICE and whether the hearing in these appeals was going to proceed. At the conference, Mr. Daigle expressed his belief that he was precluded from any further action in these appeals because of Mr. Lawson's bankruptcy petition and his NOTICE. Mr. Daigle acknowledged that he was president of NIC, that the Corporation was recognized by the Commonwealth of Massachusetts, and that the Board of Directors of NIC had taken no action to file for bankruptcy. The Board explained that, in its view, Mr. Daigle had the authority to act on NIC's behalf, including withdrawal of these appeals. The Board, outlining some of the deceptive actions perpetrated by NIC in the course of these proceedings, explained that Mr. Daigle could either withdraw or it would issue an ORDER TO SHOW CAUSE why these appeals should not be dismissed with prejudice. Mr. Daigle emphatically stated that he was not interested in prosecuting these appeals and would not go forward with their prosecution. The Board then canceled the hearing, since to go forward would be a total waste of time and effort by all concerned, and suggested that Mr. Daigle's withdrawal of NIC's appeals was the most appropriate action. Mr. Daigle demurred to the withdrawal, indicating a preference for the Board to take action because of his concern with problems he might encounter with Mr. Lawson.

On October 4, 1996, the Board issued an ORDER directing NIC by October 21, 1996, to show cause why these appeals should not be dismissed with prejudice. NIC has failed to respond to the ORDER TO SHOW CAUSE.

In the course of these proceedings, Appellant has failed to comply with the Board's ORDERS and directions a total of 16 times and five other times made required submissions up to nine months after the due date. Appellant refused to respond in any meaningful way to the Government's discovery requests. In addition, NIC never made any attempt to define its position in either appeal. Appellant, despite being provided with numerous opportunities to do so, filed no supplements to the Appeal File in either appeal. Other than its Complaints, which can be described as minimal at best, NIC has never presented any evidence or argument supporting the basis for its position in either of these appeals. The thorough documentary record provided by the VA in these appeals does not reveal a factual basis for either appeal.

DISCUSSION

We have consistently held that we have the inherent authority to invoke appropriate sanctions for a party's failure to comply with our Rules and our ORDERS. We recognize that imposing sanctions under this authority, particularly dismissal, is a drastic matter to be invoked sparingly and only in the face of the failure of a party to exhibit a "good faith" attempt to comply with the Board's ORDERS and procedures. However, the Board has warned that its "patience is a finite resource" not to be squandered by those appearing before it. *Transcriptionists-On-Call*, VABCA No. 3723, 93-2 BCA ¶ 25,670; *Willie Wood Mechanical Systems, Inc.* VABCA No. 2808R, 89-3 BCA ¶ 22,039; *Globe Disposal Co., Inc.* VABCA No. 2213, 85-3 BCA ¶ 18,274, citing *Metadure Corporation v. United States*, 6 Cl.Ct. 61 (1984). The Board broadly defines "good faith" compliance

with the Board's Rules and ORDERS by a *pro se* Appellant who would ordinarily not have the familiarity with our forum and be inexperienced in the conduct of litigation. ***Willie Wood Mechanical Systems, Inc., id.***

The course of these proceedings has been characterized by NIC's continued failure to comply with the Board's ORDERS and rules. A cursory review of the *Board of Contract Appeals Decisions* reporter reveals that Messrs. Daigle and Lawson are thoroughly familiar with, and experienced in, litigation before boards of contract appeals, having, in the past five years, been involved in eleven separate actions, exclusive of these appeals, resulting in formal decisions before two other boards. Therefore, we can only characterize NIC's actions as willful; they are not misguided actions by an inexperienced *pro se* Appellant who is otherwise making a "good faith" attempt to comply with the Board's ORDERS.

NIC's failure to comply with numerous Board ORDERS and its attempt to forestall the hearing in this matter by an unwarranted and, in our view, specious attempt to invoke Federal bankruptcy provisions to stay our proceedings has finally exhausted our patience. When NIC's failure to respond to the final ORDER TO SHOW CAUSE, and Mr. Daigle's emphatic representation that he will not further prosecute these appeals is coupled with NIC's previous failures to comply with the Board's ORDERS, there can be only one result.

It would be unfair for the Board to continue to waste its time, and to force the VA to waste its time, on further proceedings in these appeals, where NIC, by its actions and declarations has demonstrated that it will not prosecute them. Thus, in accordance with Rules 31 and 35, dismissal of these appeals for failure to prosecute is appropriate.

DECISION

For the foregoing reasons, the appeals of National Interior Contractors, Inc., under Contract No. V635C-577, VABCA Nos. 3994 and 4561, are **DISMISSED WITH PREJUDICE**.

DATE: November 1, 1996

RICHARD W. KREMPASKY
Administrative Judge
Panel Chairman

We Concur:

GUY H. MCMICHAEL III
Chief Administrative Judge

MORRIS PULLARA, JR.
Administrative Judge